92-1734

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

DAVID W. NOELL, AS
CO-EXECUTOR OF THE ESTATE OF
MILTON J. NOELL, DECEASED,

Petitioner

V.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Corporate Receiver For Northway National
Bank of Plano, Texas

Respondent.

Petition for A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does 12 U.S.C. §1823(e) or the *D'Oench, Duhme* doctrine prevent the use of a loan commitment letter to assist in confirming or clarifying the terms of a non-negotiable limited guaranty agreement?

II. Does the application of 12 U.S.C. § 1823(e) or the *D'Oench, Duhme* doctrine to preclude the consideration of a companion loan commitment letter to clarify or confirm the terms of a non-negotiable limited guaranty agreement violate the Fifth Amendment of the United States Constitution by denying the guarantor (1) due process, (2) by denying him the right to a fair trial; or constitute a taking or property without just compensation?

LIST OF PARTIES

Petitioner: David W. Noell as Co-Executor of the Estate of Milton J. Noell[1]

Respondent: Federal Deposit Insurance Corporation[2]

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[1] Milton J. Noell died before the cause was removed to the United States District Court For The Northern District Of Texas. David W. Noell and his brother, Robert Noell, were appointed Co-Executors of their father's will. After removal, David and Robert were joined as Defendants in their fiducial capacities as personal representatives of their father's estate. Addison Car Care, Inc., Noell Properties, Ltd. and Donald Murphy were also defendants in the trial court but were subsequently dismissed by actions of the District Court.

David W. Noell was also an individual Defendant in the District Court and also an Appellant to the appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reviewed, reversed and reformed that portion of the Judgment against David Noell individually. Robert Noell, in his fiduciary capacity as Co-Executor of the Estate of Milton J. Noell, also appealed from the lower court judgment.

[2] Northway Bank was the original Plaintiff in the Texas State District Court action but upon removal, the FDIC was substituted as the real Plaintiff in interest.

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Petition for A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

DAVID W. NOELL, as Co-Executor of the Estate of Milton J. Noell, Deceased, Petitioner herein, prays that a writ of certiorari issue to review the judgment and

opinion of the United State Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on December 31, 1992.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals, Fifth District, is unreported and is printed in Appendix A, page 1a infra. The judgment of the United States District Court for the Northern District of Texas is printed in Appendix A, page 11a.

JURISDICTION

The opinion of the Court of Appeals was delivered on December 31, 1992. See Appendix A, Page 1a, Infra. The Order of the Court of Appeals denying Petitioner's request for rehearing was entered on January 28, 1993. See Appendix A, page 4a,

infra. The jurisdiction of the Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution.

Statutes:

12 U.S.C. § 1823(e).

STATEMENT OF CASE

A. Basis of District Court Jurisdiction

On September 11, 1989, Northway National Bank of Plano instituted suit in the 101st Judicial District Court of Dallas County, Texas, against Addison Car Care, Inc., Milton J. Noell, David W. Noell and Don M. Murphy, seeking recovery on two

notes executed by the corporation and guaranties executed by the individuals. All Defendants but Murphy answered, over whom service of process was never obtained. The central issue before the state district court as well as on appeal to the Fifth Circuit concerned the extent of the liability of Milton J. Noell under the June 10, 1987, guaranty.

On February 6, 1990, Milton J. Noell died and David W. Noell and Robert S. Noell were jointly appointed (pursuant to the decedent's will) co-executors of the Estate of Milton J. Noell. The Noell sons, in their fiducial capacities as co-executors of the Estate of Milton J. Noell, were joined as defendants.

On April 4, 1990, and subsequent to the closing of the Northway National Bank by the Comptroller of the Currency, the FDIC, in its corporate capacity for

Northway National Bank, removed the state court suit to the United States District Court for the Northern District of Texas. The FDIC asserted removal jurisdiction premised on 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331. The parties consented to proceed before United States Magistrate William F. Sanderson, Jr. The Judgment of the Magistrate was entered on October 31, 1991, and was appealed by Petitioner directly to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 636(c).

B. Statement of Background Facts

This case concerns the proper construction of a guaranty agreement and the application of the *D'Oench* doctrine in construing the contract.

In 1987, Milton J. Noell and his son, David Noell, entered into guaranty

agreements that allowed for the construction of a car wash and related businesses on property occupied by the family cotton gin. Under the agreement, a Texas corporation, Addison Car Care, Inc. would own and operate the car wash under a ground lease on the premises. The funding for the venture involved the commitment of a loan from Northway Bank of Plano, Texas to Addison Car Care, Inc., partially guaranteed by Milton and David Noell. The Noells entered into an interim financing agreement (loan commitment) with the bank on April 20, 1987, which culminated with the closing of an interim construction loan on June 10, 1987. The corporation executed a $1.370 million primary obligation (the first note) with Milton and David providing the limited individual guaranties. As further security for the transaction, Addison Car Care, Inc. executed a deed of

trust, assignment of rents and security agreement on the lease for the benefit of the bank.

The First Note was renewed and extended on its first annual anniversary date and again on August 30, 1988. On or about May 5, 1988, Addison Car Care, Inc. executed a "second note" in the original principal amount of $100,000.00. On or about that same date, David W. Noell and Milton J. Noell executed additional guaranties guaranteeing the indebtedness represented by the second note.

The notes and guaranties went into default and on September 11, 1989, Northway National Bank of Plano instituted suit in the 101st Judicial District Court of Dallas County, Texas, under cause number 89-10922-E, against Addison Car Care, Inc., Milton J. Noell, David W. Noell and Don W. Murphy. The bank's claims in the suit included

causes of action on the two notes executed by Addison Car Care, Inc. and on the individual guaranties signed by the remaining defendants.

On February 6, 1990, Milton J. Noell died and David W. Noell and Robert S. Noell were jointly appointed co-executors of the Estate of Milton J. Noell. Defendants David W. Noell and Robert S. Noell, in their fiducial capacities as personal representatives of the Estate of Milton J. Noell, were subsequently joined as defendants.

On April 4, 1990, and subsequent to the closing of the Northway National Bank by the Comptroller of the Currency, the FDIC, in its corporate capacity for Northway National Bank, filed its Petition for Removal to the U.S. District Court for the Northern District of Texas below and intervened in the action.

David W. Noell entered into an Agreed Interlocutory Judgment for a specific sum.

Following a bench trial before Magistrate William F. Sanderson, the Magistrate, *inter alia*, found that the Noell estate breached two contractual guaranty agreements. On October 31, 1991, the Court entered judgment for damages against the co-executors (the "Estate") in the amount of $1,452,016.22. The Court additionally entered judgment against David W. Noell in the total amount of $1,922,016.22, plus post-judgment interest at the rate of 5.42 percent per annum.

C. Proceedings in the Courts Below

1. State Court Proceedings

In the 101st District Court, Northway Bank brought suit on two notes and various guaranties, two of which were executed by Milton J. Noell. The guaranty

agreement material to this proceeding is dated June 10, 1987. In the original state court suit, Defendant Milton J. Noell contended (as has always been the Estate's primary contention) that the loan commitment letter of April 20, 1987, provided for an express $400,000.00 limitation, and that the guaranty executed some fifty days later, provided for (in somewhat different language) the same $400,000.00 limitation. After the Northway Bank was closed by the Comptroller of the Currency, the FDIC intervened and removed the action to federal district court in Dallas.

2. The Proceedings Before the Federal Magistrate

By consent, the parties agreed to the referral of the cause to Magistrate Sanderson. The representatives of the Estate reurged the $400,000.00 limitation

on Milton J. Noell's individual guaranty. Defendant David W. Noell agreed to an interlocutory judgment for a defined amount and Addison Car Care, Inc., which ceased operations in January, 1990, and was now defunct, was dismissed from the suit. Subsequently, the Court entered dismissals against Noell Properties, Ltd. and Donald Murphy.

Irrespective of the expressed $400,000.00 limitation found in the letter commitment, and carried forward in the individual guaranty of Milton J. Noell, the Magistrate awarded Judgment against Milton J. Noell in an amount exceeding (including interest) $1.289 million. In addition, the Magistrate awarded interest against David Noell in an amount greater than the amount set forth in the Agreed Interlocutory Judgment. Each of these findings and awards were challenged by David W. Noell,

in both his individual and fiducial capacities, in the Fifth Circuit Court of Appeals.

D. Fifth Circuit Proceeding

On appeal, (individually and as co-executor of the Estate of Milton J. Noell) David W. Noell contested the awards of interest against him personally (beyond the amounts set forth in the Agreed Judgment) and the award of interest against his father's estate beyond the $400,000.00 limitation. With respect to the personal judgment against David, the Fifth Circuit reversed and reformed the Judgment against David Noell to reflect the correct amount of interest awarded under the contractual provisions of the Agreed Interlocutory Judgment. With respect to the award of interest beyond the $400,000.00 awarded against Milton J. Noell, the Fifth Circuit

found no error in the Magistrate's denial of the Estate's defense of a $400,000.00 limitation and, accordingly affirmed that portion of the Judgment.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues Of Exceptional Importance.

This Petition involves substantial questions of federal statutory and constitutional law. If the holding of the Fifth Circuit is allowed to stand, contracts will be reduced to meaningless scraps of paper. The continued viability of long established and time-honored principles of contract law is at stake. While there may be phenomena or institutions in every society more fundamental than contract law, the catastrophic events resulting from the absence of or the deterioration of contract

law (and attendant property rights) is none more apparent than in the economic chaos arising from the ashes of the former Soviet Union. In fact, the stated Congressional purposes of 12 U.S.C. § 1823(e) ("the statute") or this Court's apparent rationale in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), when carried beyond their original legislative or judicial intentions, threatens to do far greater damage than the evils they were crafted to eliminate. The cure is worse than the illness. If the social institution of contract is the indispensable element in any society beyond those which are primitive, then truly the havoc reeked by a liberal and expansive construction of *D'Oench* can serve only to regress the American system of economic jurisprudence back to the feudal ages. Truly, if the

D'Oench doctrine is allowed to continue its leviathan like growth and expansion, individualistic capitalism is *Duhmed*.

One can only sit and wonder what legal and economic traps await the unwary American businessman or entrepreneur who, like those very early Americans colonists, now face immeasurable economic and contractual uncertainties regarding their financial transactions. This Court clearly opined a decade ago, that individual contract and property rights are implicated by the Fifth Amendment to the U.S. Constitution. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). When Milton J. Noell and the Bank expressly agreed to a $400,000.00 limitation on his guaranty, the subsequent judicial denial of this contractual right by disallowance of contractual provisions and a denial of defenses denied him due process. The

issues presented by this petition go far beyond the issues of personal liability under a single guaranty agreement but rather challenge the fundamental fabric of American economic society.

A. The Holding Of The Fifth Circuit Violates The Estate's Right Of Due Process, Denies It A Fair Trial And Further Constitutes A Taking Of Property Without Just Compensation

Understanding that the palpable goal of the *D'Oench* estoppel is the public good, the continued expansion of the doctrine is rapidly reaching a level of diminishing returns. Long ago and, in much more difficult times, this Court previously held that contract rights constitute property within the context of Fifth Amendment due process. *Lynch v. United States*, 292 U.S. 571 (1934). The Noell Estate's contractual and property rights in the entirety of the loan documents,

including the loan commitment letter, cannot be denied without violating the due process clause. (See *Lynch* at page 579.)

The Fifth Amendment is implicated and violated by the wholesale rejection of specific aspects of the parties' loan agreement. Petitioner submits that the total emasculation of its defenses (the expressed $400,000.00 limitation) without strictly adhering to the congressional scheme set forth in 12 U.S.C. § 1823(e) constitutes an unconstitutional taking within the parameters of the "property clause" of the Fifth Amendment. Inasmuch as neither *D'Oench* nor the Statute requires the exclusion of the limitations on the guaranty, this "taking" has occurred without federal statutory or judicial authorization.

This Court has always been ever mindful that due process requires a fair

and impartial trial before a competent tribunal. And, the right to a hearing requires judicial examination of every issue that may affect the attainment of a fair trial. To preclude consideration of the parties loan commitment letter to clarify or confirm the terms of a non-negotiable guaranty agreement is tantamount to providing no meaningful trial at all. The Estate asks that it be given the benefit of its bargain and allow the parties expressed agreement provide the measure of liability under the guaranty.

B. The Application Of § 12 U.S.C. 1823(e) Or *D'Oench* Should Not Affect The Proper Application Of Texas Law As To The Contractual Construction Of Guaranty Agreements.

The ruling of the Fifth Circuit ignores undisputed facts material to the case. In its vigor to summarily apply the statute or *D'Oench* to the question of

guaranty liability, the Courts did not properly apply Texas law concerning the construction and enforcement of guaranty agreements. Petitioner submits that had Texas law construing the construction of the guaranty been properly applied, the *D'Oench* question would never have arisen. That is, a proper reading of the guaranty itself should have resulted in a $400,000.00 limitation of liability.

Petitioner submits that under a Texas guaranty contract, the principal's liability measures the guarantor's liability unless the guarantor expressly limits his obligation. *Technical Consultant Services v. Lakewood Pipe*, 861 F.2d 1357 (5th Cir., 1988). Texas law views guarantors favorably and the Texas Courts consistently construe guaranty agreements in favor of the guarantor. *Texas Commerce Bank v. Capital Bancshares,*

Inc., 907 F.2d 1571 (5th Cir. 1970).

The rights of guarantors must, at first instance, be determined from the express language of the guaranty. *U.S. v. Little Joe Trawlers, Inc.*, 776 F.2d (5th Cir. 1985). If uncertainty or ambiguity exists with respect to the guaranty, its terms should be given a construction which is most favorable to the guarantor. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). Where uncertainty exists as to the meaning of a guaranty, and if two reasonable constructions may be made, the reviewing court will apply the construction more favorable to the guarantor. *Western Bank-Downtown v. Carlene*, 757 S.W.2d 111 (Hou. App. [1st Dist.]; 1988) err. denied.

Texas case law provides that a construction of a contract that renders a clause meaningless is unreasonable and is not preferred by the Court. *Praeger v.*

Wilson, 721 S.W.2d 597 (Ft. W. App., 1986, n.r.e.). It is incumbent on the court to be ever mindful of the parties' intentions when the guaranty was executed. *Borders v. KRLB*, 727 SW.2d 357, (Amar. App. 1987, ref. n.r.e.). If a contract is fraught with ambiguity, persuasive evidence of the parties intentions is the "polestar for courts" in construing contracts. *Browning v. Navarro*, 743 F.2d 1069 (5th Cir., 1984) rehearing denied 747 F.2d 1465, appeal after Remand 826 F.2d 335, rehearing denied 830 F.2d 1126.

In applying Texas law to the June 10, 1987 guaranty, we note that Article III of the guaranty sets forth the performance obligations of the Guarantor. As pertinent it reads as follows:

Article III

> *Section 3.1. Guarantor unconditionally guarantees unto the Lender the payment of the*

> *Debt when due (whether at the stated maturity date, by acceleration or otherwise) in accordance with the terms of the Loan Documents.* This Guaranty is unconditional and absolute, and if for any reason all or any portion of the Debt shall not be paid promptly when due, Guarantor will immediately pay the Debt to the Lender or other person or entity entitled thereto, regardless of any defense, right of set-off or counterclaim which the Borrower may have or assert, and regardless of whether Lender or any other person or entity shall have taken any steps to enforce any rights against the Borrower or any other person or entity to collect such sum, and regardless of any other condition or contingency. (emphasis supplied)

In a single sentence (the "sentence") defines the debt as follows:

> *Debt* shall mean in [sic] the indebtedness evidenced by the Note and the indebtedness to the lender incurred under or evidenced by the Loan Documents, *but such Debt shall be limited to $400,000.00*, plus all accrued and unpaid interest on the unpaid principal balance of the Note in addition to indebtedness to the Lender incurred under or evidenced by the Loan Documents.

(emphasis supplied)

The Executor contends that the stilted, convoluted and grammatically incorrect language defining the debt should be construed strictly and most favorably to Defendants. *Texas Commerce Bank, Supra; Commerce Sav. Assn. v. GGE Mgt. Co.*, 539 S.W.2d 7 (Hou. Civ. App. [1st Dist.] 1976, n.r.e.). The Guaranty should be limited to $400,000.00 inclusive of all interest, costs, expenses and attorney's fees.

If the Court is not convinced that the guaranty is so limited, the loan commitment letter clarifies and confirms the expressed limitations expressly placed on the guaranty by the parties. The commitment letter sets forth the following language describing the extent of the guarantors' liability for the loan. The loan commitment letter provides:

2. Guaranties:

> David W. Noell, Don W. Murphy (Guarantors) shall each execute a Guaranty Agreement in favor of Lender, jointly and severally guaranteeing the obligations of Borrower under the Loan. *Milton J. Noell will execute a Guaranty Agreement in favor of Lender, jointly and severally guaranteeing the obligations of Borrower limited to $400,000.00 under the loan.*

The commitment is clear and unambiguous. The Estate's (Milton J. Noell's) monetary obligations are limited to $400,000.00 under the June 10, 1987, guaranty.

In this case, there is no intent to deceive bankers or regulators. The borrowers have not taken part in any scheme to perpetrate a fraud on a financial institution. The loan commitment letter was prepared on Northway National Bank letterhead and executed by each of the Defendants as well as by the duly

authorized representative of the Bank. When the commitment is read in conjunction with the remaining loan documents (including the loan commitment letter), a plain reading evidences an unmistakable intention by the parties to limit the guaranty of Milton J. Noell to $400,000.00. The application of general rules of contract construction do not make for side agreements. Neither *D'Oench* nor the statute should interfere with the parties' legitimate contractual relations.

C. *D'Oench, Duhme* Should Not Apply When Its Application Results In An Illogical And Inconsistent Construction Of The Guaranty Agreement.

The construction applied by the Fifth Circuit to the guaranty of Milton J. Noell defeats the primary objective of contract construction. What were the parties' intentions? The threshold

question concerning the parties' intentions is what were the parties' intentions under the guaranty of June 10, 1987, which limited the debt to $400,000.00, "plus all accrued and unpaid interest on the unpaid principal balance of the note in addition to indebtedness to the lender incurred or evidenced by the loan documents." (emphasis supplied.) It is undisputed that the parties intended by the guaranty to limit to a certain extent, the liability of Milton J. Noell. The larger question is that under such a limited guaranty did the parties actually intend that the liability of the guarantor could only be terminated and measured by the actual payment of the principal balance of the underlying debt. The rhetorical question that begs answering is why would either party to such an agreement desire to allow its agreement to be governed by such uncertainty and

indefiniteness. The Executor submits that the prospect of a guarantor's never ending liability is inherently contradictory to the idea of a limited guaranty. By its very terms, a limited guaranty seeks to give the guarantor some control over the extent of his obligation and exposure for damages. In this case, however, the guarantor cannot terminate or limit his liability by paying the principal amount of his guaranty obligation. The guarantor's liability will only cease if the entire, unlimited obligation (the underlying note) is paid by the obligor or the guarantor.

If the guarantor's total liability with respect to accruing interest is measured by a principal amount wholly different from his own principal amount of liability under his guaranty, the guarantor has absolutely no control over the payment of the total amount of the debt owed under

the guaranty agreement. Irrespective of the expressed $400,000.00 limitation, under the Fifth Circuit's construction under the agreements, the guarantor could never terminate his ongoing liability under the guaranty by paying the $400,000.00 limitation plus accrued interest without the contemporaneous payment of the total principal balance of the underlying note. For example, if Milton J. Noell had paid off the principal amount of his guaranty before the accrual of any interest on the underlying obligation (and the principal amount is undisputed to be $400,000.00), his resulting liability under the guaranty language "plus all accrued and unpaid interest on the unpaid principal balance of the note...." would continue indefinitely until the obligor paid off the entire "unpaid principal balance of the note." Under these circumstances, the guarantor's

liability is infinite. His obligation unlimited. Of course, the Guarantor could always pay off the maker's entire obligation. Certainly, the parties, could not have intended such a result by the inclusion of the language "but such debt shall be limited to $400,000.00."

The lower court's construction of the guaranty creates a continuing liability on the part of the guarantor that can only be limited by the actual entry of judgment itself. That is, whereas the guarantor (if he were financially capable) can limit and payoff the finite amounts described in the principal amount of the judgment entered by the Magistrate, he could not do so by paying off the principal amount of his guaranty. The resulting anomaly created is that the judgment entered by the Magistrate cannot be reflective of the amounts owed under the guaranty because the judgment

amounts awarded are definite and ascertainable and the guarantor's liability under the guaranty is not. In fact, the judgment against Milton J. Noell accrues postjudgment interest on the principal amount of the judgment awarded against him and not interest on the principal amount of the unpaid note. The Fifth Circuit's construction of the guaranty results in inconsistent and contradictory calculations as to the correct amounts owed under the guaranty and the judgment. *D'Oench* should not be applied where in frustrates the written expressions of the parties. The Texas rules on contract construction should be applied to avoid the entry of an incorrect judgment.

D. The Application Of § 12 U.S.C. 1823(e) Or *D'Oench* Does Not Prevent The Consideration Of Related Loan Documents In The Bank's Files To Clarify Language In The Loan Asset.

The parties loan commitment letter of April 20, 1987, is the very loan document or instrument from which the entire interim construction loan evolved. To preclude its consideration in clarifying the terms of the guaranty asset is to ignore the very purpose of a loan commitment. A commitment is just that. It is a commitment. The New World Dictionary, 2nd Ed. (World Publishing Co.: 1968), describes it as "to bind as by a promise." Certainly, upon execution of the letter commitment, both Milton J. Noell and the Bank were legally obligated to perform in accordance with the terms of the commitment. The letter commitment is the best evidence of just what the parties intended when the loan package originated. It provided for the preparation of conforming closing documents. It is also evidence of what the closing documents

mean. It is undisputed that the commitment letter was never modified or amended. All closing documents were prepared in reliance on the obligations set forth in the commitment. The $400,000.00 limitation should have been applied to the guaranty.

The *D'Oench* doctrine is a rule of estoppel that "prevents those who give notes to federally insured institutions from raising defenses based upon side agreements made with officers of failed banks. *FDIC v. Byrne*, 736 F. Supp. 727, 731 (N.D. Tex. 1990). It applies only where a borrower lends himself to a scheme or arrangement whereby the banking authority insuring the bank was or was likely to be misled. *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989).

Presumably, the ruling of the Fifth Circuit precludes the consideration of a related loan documents to clarify a

loan asset because it might mislead the regulators. In effect, what the Fifth Circuit is doing is transforming *D'Oench* from a rule that prohibits the enforcement of side agreements to one that excuses regulators from doing their homework. Here, the loan commitment letter was contained in the Bank's files. It is a loan document that is referred to in the Guaranty. The regulators were not deceived. In order to ascertain the parties' true intentions, the lower courts should have applied and considered the loan commitment letter when it construed the June 10, 1987, guaranty. Neither *D'Oench* nor the Statute precludes its application or consideration in this context.

E. The Holding By The Fifth Circuit Conflicts With Established Decisions, (Including Its Own Prior Decisions) That *D'Oench* Does Not Prohibit The Use Of Existing Loan Documents To

Clarify Or Construe The Terms Of The Assets It Holds.

The holding by the Fifth Circuit is inconsistent with its previous holdings concerning guaranties and other collateral loan documents. In previously construing *D'Oench*, the Fifth Circuit explicated the policy considerations for according special treatment to the FDIC. While not restating the obvious, of primary importance is the type of obligation sought to be enforced and the circumstances surrounding the original transaction. Notes are treated differently from secondary obligations such as guaranties. In *Sunbelt Savings, FSB Dallas, Texas v. Montross*, 923 F.2d 353 (5th Cir. 1991), the Court held that the *D'Oench* estoppel defense do not protect the FDIC where non-negotiable notes are involved. In *Sunbelt Savings*, the Court wrote:

> "When the FDIC assumes control of an institution, the assets are what they are -negotiable instruments, contracts, real property, and so on. We agree that the FDIC should not be disadvantaged by the circumstances of its assumption of control, but this policy does not require giving the FDIC the ability to transmute lead into gold.

Under Texas law, guaranties are not primary obligations; they are non-negotiable instruments. As such, guaranties are not afforded the same enforcement protection as notes. Such is the case with the Milton Noell guaranty. The FDIC should not be allowed to use the *D'Oench* doctrine as a sword and ignore the parties' true intentions with respect to the $400,000.00 limitation expressed in the guaranty. In the words of *Sunbelt*, this serves only to allow the FDIC to "pan for gold" at the expense of the guarantor.

It is undisputed that the loan

commitment letter was present in the Bank's records at the time that the Bank was declared insolvent and the FDIC receivership commenced. It cannot be characterized as a "side agreement." The judicial construction of the term "agreement" as in the statute's prohibition of "side agreement" focuses upon whether the agreement has been put in writing and kept as official bank records. *FDIC v. Galloway*, 856 F.2d 112 (10th Cir. 1988); *Templin v. Weisgram*, 867 F.2d 240 (5th Cir. 1989). Neither *D'Oench* nor §1823(e) precludes the consideration of the loan commitment letter to construe the guaranty when the guaranty itself arises out of the expressed terms of the loan commitment letter and when each are a part of the bank's loan documentation. *Federal Deposit Ins. Corp. v. LaGuarta*, 939 F.2d 1231 (5th Cir. 1991). As in *LaGuarta*, none of the

considerations or policies for applying *D'Oench* are present in this case. The commitment letter clearly describes the $400,000.00 limitation; it is part of the loan documentation; and its referred to in the actual loan asset held by the FDIC.

The Courts are in agreement that while *D'Oench, Duhme* does require full disclosure of agreements between lenders and borrowers, it does not require that such agreements be confined to the face of any one particular lending/borrowing document. *Resolution Trust v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992). *D'Oench* does not prohibit defenses that are based on written agreements that are integral to the loan transaction. *LaGuarta*, at 1238. Neither *D'Oench* nor the statute precludes consideration of the loan commitment letter to confirm or clarify the Noell guaranty.

Fundamental fairness and justice require that the records of this cause be reviewed for a proper application of its facts to the law.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7297

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity for Northway National Bank,

Plaintiff-Appellee,

versus

ADDISON CAR CARE, INC., ET AL.,

Defendants,

DAVID W. NOELL, ROBERT S. NOELL,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas

(CA 3 90 0823 R)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

APPENDIX A

PER CURIAM:*

This appeal involves the interpretation of two guarantee agreements. Finding no reversible error in the magistrate judge's interpretation of the agreements, we affirm in all respects except as to the rate of interest as applied to one of hte defendants, David W. Noell.

Before the case went to trial, David W. Noell entered into an agreed judgment with the plaintiff, the Federal Deposit Insurance Corporation ("FDIC"). David Noel and the FDIC agree that the agreed judgment

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

governs David Noell's liability, but they disagree over the proper interpretation of that judgment. The agreed judgment provided that David Noell was liable to the FDIC in the sum of "$970,000, with interest thereon from August 30, 1988 to the date of judgment at the rate of eighteen percent per annum, and with interest thereon at the rate of ten percent per annum from the date of judgment until paid, together with all costs of Court in this behalf expended." The court entered the agreed judgment on February 11, 1991.

The magistrate judge's final judgment in this case, however, provided that David Noell pay eighteen percent interest on the debt until the court entered the final judgment on October 31, 1991.

The question before us is whether the district court erred when it entered a

judgment that required David Noell to pay eighteen percent interest until October 31, 1991. David Noell contends that, pursuant to the agreed judgment, he should have to pay only ten percent interest beginning February 11, 1991, the date the court entered the agreed judgment. David Noell argues that the judgment the parties were referring to in the agreed judgment is the agreed judgment itself. Thus, he should owe the FDIC the sum of "$970,000, with interest thereon from August 30, 1988 to the date of the [agreed] judgment at the rate of eighteen percent per annum, and with interest thereon at the rate of ten percent per annum from the date of the [agreed] judgment until paid, together with all costs of Court in this behalf extended."

The FDIC, on the other hand, contends

that the district court correctly required David Noell to pay eighteen percent interest until October 31, 1991. The FDIC argues that the judgment that the parties were referring to in the agreed judgment is the final judgment that the court entered over eight months later on October 31, 1991. Thus, David Noell should owe the FDIC the sum of "$970,000, with interest thereon from August 30, 1988 to the date of the [final] judgment at the rate of eighteen percent per annum, and with interest thereon at the rate of ten percent per annum from the date of the [final] judgment until paid, together with all costs of Court in this behalf extended."

We are convinced that the parties were referring to the agreed judgment and not the final judgment. It is certainly implicit, if not explicit, that when the

parties referred to "judgment," they were referring to the judgment embodied and reflected in the agreed judgment that resolved the claim against David W. Noell in the amount of $970,000, and not to some later judgment that might conclude the entire case. Indeed, the agreed judgment was the only judgment in the case at the time the court entered it. Thus, there was no need to describe further the judgment the parties were referring to. Therefore, to this limited extent, we REVERSE the magistrate judge's judgment and REMAND to the district court with instructions to amend the judgment in accordance with this opinion. In all other respects, the district court is AFFIRMED.

AFFIRMED in part; REVERSED in part; and REMANDED for ENTRY OF JUDGMENT.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7297

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity for Northway National Bank,

Plaintiff-Appellee,

versus

ADDISON CAR CARE, INC., ET AL.,
Defendants,

DAVID W. NOELL and ROBERT S. NOELL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITIONS FOR REHEARING

(January 28, 1993)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby

APPENDIX A

DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

REHG-5

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION	)	
VS.	)	CA3-90-823-AH
ADDISON CAR CARE, INC., ET AL	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference filed on November 19, 1990 and the written consents of the Plaintiff and Defendant, Estate of Milton J. Noell, and the provisions of 28 U.S.C. §636(c), on September 9, 1991, came on to be heard the FDIC's claims against the said Defendant, without a jury, and based upon the stipulations of the parties, the testimony and the documentary evidence presented, the court makes the following findings of fact

APPENDIX A

and conclusions of law pursuant to Rule 52, Federal Rules Civil Procedure:

FINDINGS OF FACT:

1. On or about April 20, 1987, Addison Car Care, Inc. and Northway National Bank ("Bank") entered into a Loan Commitment Agreement wherein the Bank was to make an interim construction loan and a permanent loan to furnish funds not to exceed $1,370,000.00. Milton J. Noell executed the Agreement for the purpose of agreeing to execute a Guaranty Agreement in favor of the Bank, guaranteeing the obligation of Addison Car Care, Inc. limited to $400,000.00.

2. On or about June 10, 1987, Defendant Addison Car Care, Inc., executed and delivered ot the Bank a certain Promissory Note dated June 10, 1987, in the

principal amount of $1,370,000.00 whereby Defendant Addison Car Care, Inc. promised to pay to the Bank, or its order, the principal sum together with interest due and payable as provided therein at the Bank's office in Dallas County Texas (the "First Note").

3. On or about June 10, 1987, Milton J. Noell, now deceased, executed and delivered to the Bank a guaranty agreement whereby Defendant Milton J. Noell promised and agreed to guarantee payment of all indebtedness that Defendant Addison Car Care, Inc. owed to the Bank under the terms of the First Note, limited to $400,000.00 plus all accrued and unpaid interest on the unpaid principal balance of the note and all renewals, extensions and modifications thereof (the "Milton Noell First Note Guaranty").

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4. On or about June 10, 1987, Defendant Addison Car Care, Inc. entered into a Ground Lease Agreement with Defendant Noell Properties Ltd. by which, Defendant Noell Properties Ltd. granted a lease to Addison Car Care, Inc. to a tract of land in Addison, County of Dallas, State of Texas, upon which Defendant Addison Car Care, Inc. built and operated a car wash facility. The construction of said car was facility was primarily financed by the First Note.

5. On or about June 10, 1987, Defendant Addison Car Care, Inc. executed a Deed of Trust, Assignment of Rents and Security Agreement for the benefit of the Bank as security for the First Note. By such agreement, the Bank was granted a security interest in all buildings, improvements, equipment, fixtures, any

other properties and all lease agreement covering or effecting any of the property described in the Ground Lease Agreement between Defendant Addison Car Care, Inc. and Defendant Noell Properties Ltd.

6. On June 10, 1987, the Defendant Addison Car Care, Inc. executed a collateral assignment of Ground Lease and an assignment of leases as additional security for the First Note.

7. On or about May 5, 1988, Defendant Addison Car Care, Inc. executed and delivered to the Bank a certain promissory Note dated May 5, 1988, in the principal amount of $1,000,000.00, whereby Defendant Addison Car Care, Inc. promised to pay to the Bank, or its order, the principal sum of $100,000.00 together with interest due and payable as provided therein at the Bank's offices in Dallas

County, Texas (the "Second Note").

8. On or about May 5, 1988, Defendant Milton J. Noell executed and delivered to the Bank a guaranty agreement whereby Milton J. Noell promised and agreed to guarantee payment of all indebtedness of Defendant Addison Car Care, Inc. owed to the Bank pursuant to the terms of the Second Note and all renewals, extensions and modifications thereof (the "Milton Noell Second Note Guaranty").

9. The First Note was subsequently renewed and extended on or about June 10, 1988, by renewal Extension and Modification Agreement, and was again renewed and extended on or about August 30, 1988, by Renewal, extension and Modification Agreement.

10. On the date of the execution of all notes, agreements and transactions

herein before described, the Bank was a national bank association organized and existing under the laws of the United States with its principal office being located in Addison, Dallas County, Texas.

11. On or about January 23, 1990, the Internal Revenue Service closed Addison Car Care, Inc. because of failure to pay federal taxes withheld from its employees and on such date Addison Car Care, Inc. discontinued operation of its business.

12. On or about January 23, 1990, the principals of Addison Car Care, Inc. surrendered the premises of the business to Michael Markham as agent for Milton Noell, in consideration for Mr. Noell' agreement to pay the IRS taxes that were due and payable by Addison Car Care, Inc.

13. On or about January 23, 1990, Addison Car Care, Inc. agreed to surrender

the premises to Milton Noell if Milton Noell would release Addison Car Care, Inc. from any past due rental payments and if Milton Noell would pay to the IRS taxes which were due from Addison Car Care, Inc.

14. Milton J. Noell was deceased February 6, 1990. David W. Noell and Robert R. Noell are the Independent Co-Executors of the Estate of Milton J. Noell.

15. On February 15, 1990, the Office of the Controller of Currency declared the Bank insolvent and appointed the FDIC to serve as its Receiver pursuant to 12 USC §191 and 1821(c). On the same day FDIC-Receiver entered into a Contract of Sale with FDIC-Corporate where FDIC-Corporate purchased from FDIC-Receiver all of the rights, title and interest in the First Note and Second Note, and the First and Second Note Guaranty Agreements executed by

Defendants. Accordingly, FDIC-Corporate is now the owner and holder of the Notes, and is fully entitled to enforce all obligations of the Defendants thereunder.

16. To the extent that any of the following conclusions of law are deemed to constitute findings of fact, the same are adopted by reference as if set out in full herein.

CONCLUSIONS OF LAW:

1. To the extent that any of the preceding findings of fact are deemed to constitute conclusions of law, the same are adopted by reference as if set out in full herein.

2. Jurisdiction over this proceeding and the parties is conferred by 12 U.S.C. §1819(b)(2)(A) and 28 U.S.C. §1331.

3. Pursuant to the Guaranty Agreement dated June 10, 1987, the estate

of Milton J. Noell is obligated for payment of past due principal in the amount of $400,000.00 plus all accrued and unpaid interest on the unpaid principal balance of the First Note from January 10, 1989, at the rate of 18 per cent per annum to the date of judgment.

4. Pursuant to the Guaranty Agreement dated May 5, 1988, the estate of Milton J. Noell is obligated for payment of past due principal in the amount of $100,000.00 plus all accrued and unpaid interest on the unpaid principal balance of the Second Note from January 10, 1989, at the rate of 18 per cent per annum to the date of judgment.

5. On or about January 23, 1990, the ground Lease Agreement was surrendered to Milton J. Noell, thereby terminating all lease obligations of Addison Car Care, Inc.

APPENDIX A

6. The Defendant, the Estate of Milton J. Noell, is not entitled to the benefit of any offsets for lease payments, tax or other payments under the ground Lease Agreement dated June 10, 1987.

7. The surrender and termination of the Lease Agreement by Milton Noell damaged the FDIC by eliminating the FDIC's right pursuant to the Deed of Trust, Assignment of Rents and Security Agreement to protect its interest in the leasehold estate.

A copy of these findings of fact and conclusions of law shall be transmitted to counsel for the parties.

ENTERED this 1st day of October, 1991.

/s/ Wm. F. Sanderson, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS LIQUIDATOR OF NORTHWAY NATIONAL BANK, PLAINTIFF,	§	CIVIL ACTION NO. CA3-90-0823-R
VS.	§	
ADDISON CAR CARE, INC., MILTON J. NOELL, DAVID W. NOELL AND DON W. MURPHY, DEFENDANTS.	§	

JUDGMENT

On the 9th day of September, 1990, came on to be heard the above entitled and numbered cause and the FDIC, in its corporate capacity as Liquidator of Northway National Bank, the Plaintiff, appeared by its appointed representative

and by attorney of record and announced ready for trial; and David W. Noell and Robert S. Noell as co-executors of the estate of Milton J. Noell, appeared in person and by attorney of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and the arguments of counsel, is of the opinion that with respect to the First Note the FDIC is entitled to recover of and from the estate of Milton J. Noell the principal sum of $400,000.00 plus interest thereon at the rate of 18 per cent per annum from January 10, 1989 to October 28, 1991. The Court further finds that the FDIC is entitled to recover interest on the principal amount of $1,513,299.03, as of

January 10, 1989, at the rate of 18 per cent per annum from January 10, 1989 through October 28, 1991 in the amount of $889,952.86.

Further, after hearing the evidence and the arguments of counsel, the Court is of the opinion that with respect to the Second Note the FDIC is entitled to recover of and from the estate of Milton J. Noell the principal sum of $100,000.00 plus accrued interest at the rate of 18 per cent per annum from January 10, 1989 through October 28, 1991 in the amount of $62,063.36.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Federal Deposit Insurance Corporation, in its corporate capacity as Liquidator of the Northwest National Bank, have and recover from David W. Noell and Robert S. Noell as co-

executors of the estate of Milton J. Noell, jointly and severally, the sum of $1,452,016.22.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that the interlocutory Agreed Judgment rendered against David W. Noell on February 11, 1990 is hereby final.

IT IS THEREFORE, FURTHER, ORDERED, ADJUDGED AND DECREED that the Federal Deposit Insurance recover of and from David W. Noell the amount of $1,922,016.22 ($970,000.00 plus interest in the amount of $952,016.22).

IT IS FURTHER ORDERED, that the Judgment hereby rendered shall bear interest at the current U.S. Treasury Bill rate of 5.42 per cent per annum until paid.

All costs of Court expended in or incurred in this cause are hereby adjudged

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against the Defendants Addison Car Care, Inc., David W. Noell individually, and David W. Noell and Robert S. Noell, co-executors of the estate of Milton J. Noell.

All writs and processors for the enforcement and collection of this Judgment or the costs of Court may be issued as necessary. All other relief not expressly granted herein is denied.

Signed this 31st day of October, 1991.

/s/ Wm. F. Sanderson, Jr.
Judge Presiding

(2)

Supreme Court, U.S.
FILED
JUL 12 1993
CLERK OF THE CLERK

No. 92-1734

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID W. NOELL, CO-EXECUTOR OF ESTATE OF MILTON J. NOELL, DECEASED, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly concluded that under Texas law a guaranty imposed liability not only for $400,000 of the principal balance of the underlying debt, but also for unpaid interest on the outstanding balance of the underlying debt.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1734

DAVID W. NOELL, CO-EXECUTOR OF ESTATE OF MILTON J. NOELL, DECEASED, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported, but the judgment is noted at 983 F.2d 231 (Table). The judgment of the district court (Pet. App. 20a-24a) and the findings of fact and conclusions of law of the magistrate judge (Pet. App. 9a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1992. A petition for rehearing was denied on January 28, 1993. Pet. App. 7a-9a. The petition for a writ of certiorari was filed on April 27,

1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 20, 1987, Addison Car Care, Inc. (Addison Car) and Northway National Bank executed a letter agreement, under which the bank agreed that it would loan Addison Car up to $1,370,000 to build and operate a car wash facility. The commitment was subject to a number of conditions, including a requirement that Milton J. Noell (Noell) execute a document "guaranteeing the obligations of [Addison Car under the loan] limited to $400,000." Commitment Letter ¶ 2, II R. 368; see Pet. 24.[1] The commitment also provided that "[t]he form, substance and execution of each and every document evidencing or incident to the [l]oan, * * * or any collateral security, * * * must be approved by [the bank's] counsel." Commitment Letter ¶ 20, II R. 377.

When the loan closed on June 10, 1987, Noell executed a guaranty, which stated that he "unconditionally guarantees unto the [bank] the payment of the Debt when due." Guaranty § 3.1, III R. 25; see Pet. 21-22. The document defined the term "Debt" to mean

> the indebtedness evidenced by the Note and the indebtedness to the [bank] incurred under or evidenced by the [other documents related to the loan], but such Debt shall be limited to $400,000.00, plus all accrued and unpaid interest on the unpaid principal balance of the Note in addition to indebtedness to the [bank] incurred under or

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[1] "R." refers to the record in the district court.

> evidenced by the [other documents related to the loan].

Guaranty art. I, III R. 25; see Pet. 22. When Addison Car failed to perform its obligations under the loan, the bank filed suit in the Texas courts against Addison Car and Noell. After Noell's death, petitioner, together with his co-executor Robert Noell, became defendants in the case.[2]

2. On February 15, 1990, the bank was declared insolvent and the Federal Deposit Insurance Corporation was appointed receiver. On that same day, the Federal Deposit Insurance Corporation as receiver sold its interest in the guaranty and related documents to the Federal Deposit Insurance Corporation in its corporate capacity (FDIC). The FDIC removed the case to federal district court in April 1990. Pet. App. 16a-17a; Docket Entry 1.[3]

3. After a bench trial, a magistrate judge held petitioner liable to the FDIC under the guaranty. Pet. App. 9a-19a. With respect to petitioner's liability on the guaranty, the magistrate judge stated simply that petitioner "is obligated for payment of past due principal in the amount of $400,000.00 plus all accrued and unpaid interest on the unpaid principal balance of the [note]." *Id.* at 18a.

4. The district court entered judgment in accordance with the magistrate judge's ruling. Pet. App.

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[2] The guaranty expressly bound not only Noell, but also his "heirs, devisees, executors, administrators, personal representatives, successors and assigns." Guaranty § 8.1, III R. 31.

[3] "Docket Entry" refers to the numbered docket entries in the district court.

20a-24a. Petitioner's total liability on the guaranty was $889,952.86. *Id.* at 21a-22a.

5. In an unpublished opinion, the court of appeals affirmed the judgment with respect to the matters at issue in this petition. Pet. App. 1a-6a. The court did not expressly address the issues raised in this Court, stating only that it found "no reversible error in the magistrate judge's interpretation of the agreements." *Id.* at 2a.

ARGUMENT

Petitioner argues (Pet. 16-38) that the lower courts erred in applying this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), to preclude consideration of the commitment letter in determining the terms of petitioner's contract with the failed bank. Specifically, he contends that if the lower courts had considered the commitment letter they would have concluded that his total liability under the guaranty was limited to $400,000, and that he was not liable for interest or other costs beyond that amount. See, *e.g.*, Pet. 21-24.

Petitioner completely fails to show that the lower courts relied on *D'Oench, Duhme* to resolve this case. Rather, those courts apparently relied on the plain language of the guaranty to determine petitioner's obligations. As noted above, the guaranty provides that petitioner is liable for "$400,000.00, plus all accrued and unpaid interest on the unpaid principal balance of the Note." Guaranty art. I, III R. 25; see Pet. 22. Because that language so plainly imposes liability on petitioner for interest in addition to the $400,000 base amount, it would have been improper under Texas law for the lower courts to have considered the language of the commitment letter as

evidence to support a contrary reading of the guaranty. See, *e.g.*, *Houston Lighting & Power Company* v. *Tenn-Tex Alloy & Chemical Corporation*, 400 S.W.2d 296, 300 (Tex. 1966) (meaning of unambiguous documents cannot be altered by extrinsic evidence).

In any event, it is not at all surprising that the relatively spare language of the commitment does not precisely delineate the limits of the guarantor's obligations. The commitment describes the terms of the required guaranty in a single sentence, Commitment Letter ¶ 2, II R. 368, and subjects that description to the condition that the bank's counsel had to approve the form and substance of the guaranty before the loan could be closed, Commitment Letter ¶ 20, II R. 377. The actual guaranty was an eight-page single-spaced document including numerous provisions that could not plausibly have been set forth in a brief commitment letter. See Guaranty, III R. 25-32. In those circumstances, it would have been quite odd to conclude that the general terms of the commitment, rather than the precisely drawn terms of the operative document, accurately described the agreement of the parties. Cf. *Batterman* v. *Wells Fargo AG Credit Corp.*, 802 P.2d 1112, 1115 (Colo. Ct. App. 1990) (obligations under loan commitment merged into obligations under operative documents).

In sum, the decision of the lower courts appears to rest entirely on state law questions regarding the proper manner of interpreting a contract. There is no basis for supposing that the resolution of those questions—in which both of the lower courts concurred—presents any question worthy of attention by

this Court. Compare *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1993